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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

INVESTORS EQUITY LIFE HOLDING  
COMPANY,

Plaintiff and Appellant,

v.

JEFFREY P. SCHMIDT et al.,

Defendants and Respondents.

G054532

(Super. Ct. No. 30-2009-00119128)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gail  
Andrea Andler, Judge. Affirmed.

Lewis Brisbois Bisgaard & Smith, Joseph K. Hegedus and Caroline E.  
Chan; Parker Mills and David P. Parker for Plaintiff and Appellant.

Dailey & Heft and Lee H. Roistacher for Defendants and Respondents  
Jeffrey P. Schmidt, individually and as the Hawaii Insurance Commissioner, Lawrence  
Reifurth, individually and as the Hawaii Insurance Commissioner, and Timothy P.  
Bogan.

Reed Smith and Bernard P. Simons for Defendants and Respondents  
Hawaii Life and Disability Insurance Guaranty Association, Hawaii Association Grantor  
Trust, Renee B. Buck in her capacity as personal representative of the estate of Fred A.  
Buck, and Buck & Associates.

\* \* \*

In 2009, the trial court stayed this case after determining Investors Equity Life Holding Company (IELHC) had an adequate forum for its claims in Hawaii, or it could return to California if the Hawaiian forum proved to be inadequate. IELHC appealed the order, which this court affirmed in *Investors Equity Life Holding Co. v. Schmidt* (2011) 195 Cal.App.4th 1519 (*Investors Equity I*). In the opinion, this court (a different panel), affirmed the trial court's assessment that Hawaii qualified as a suitable alternative forum for adjudicating IELHC's claims, correctly applying the equitable doctrine of forum non conveniens. (*Id.* at p. 1535.) This court also rejected IELHC's secondary contention that the trial court abused its discretion in concluding the balance of public and private factors favored Hawaii as a forum over California. (*Id.* at p. 1536.)

Soon thereafter, the trial court considered motions to dismiss the action based on several statements this court made in *Investors Equity I*. Applying the doctrine of law of the case, the trial court dismissed the case. IELHC appealed, and we reversed the order, concluding the trial court abused its discretion. (*Investors Equity Life Holding Co. v. Schmidt* (2015) 233 Cal.App.4th 1363 (*Investors Equity II*).) We explained the prior opinion affirmed the order staying the case after we relied on certain promises and stipulations made by the parties *in this forum*, as well as our own analysis of the Hawaiian statute of limitations. (*Id.* at p. 1368.) We noted that because the parties' stipulations and our legal analysis of the statute of limitations would not be binding in a different forum, the case was merely stayed rather than dismissed to give IELHC "the opportunity to seek relief in the courts of this state." (*Investors Equity I, supra*, 195 Cal.App.4th at p. 1534)." (*Ibid.*) In addition, this court concluded the trial court should

not have treated our statements regarding IELHC's residency as law of the case because the statements reflected factual not legal determinations. (*Id.* at p. 1369.)

The matter came before us a third time at the end of December 2015, when IELHC filed a writ petition (*Investors Equity Life Holding Co. v. Schmidt* (Feb. 23, 2016, G052978) [nonpub. order] (*Investors Equity III*), and appeal (*Investors Equity Life Holding Co. v. Schmidt* (Feb. 19, 2016, G052983) [nonpub. order] *Investors Equity IV*), after the trial court denied its motion to lift the stay on the grounds its primary place of business was California. This court dismissed the appeal because the order was non-appealable. (*Investors Equity IV, supra*, G052983.) We denied the writ petition, stating in the order, "Respondent court may consider a motion to dismiss this action if petitioner fails to commence an action in Hawaii within six months of the date of this order." (*Investors Equity III, supra*, G052978.)

A little over six months later, the trial court dismissed the case pursuant to Code of Civil Procedure section 583.410,<sup>1</sup> due to IELHC's failure to commence an action and prosecute its claims in Hawaii for over seven years. IELHC's appealed this decision and maintains the order must be reversed for the following reasons: (1) the trial court failed to adjudicate IELHC's residence as directed by this court and as required by the forum non conveniens doctrine; (2) as a California resident, IELHC was entitled to its choice of California as its forum; (3) Hawaii was not a suitable forum; (4) the action must proceed in California to preserve IELHC's right to a jury trial; (5) the unconditional stay was procedurally improper and should be vacated; (6) public policy supports reversal of the judgment; (7) the court abused its discretion in dismissing the case because it was "undisputed" IELHC had "been extremely diligent in its prosecution of this lawsuit in California," and (8) the court erred in denying IELHC's motion for reconsideration. We conclude these arguments lack merit. We affirm the judgment.

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<sup>1</sup> All further statutory references are to the Code of Civil Procedure, unless otherwise indicated.

## FACTS

### A. *The Initial Forum Non Conveniens Motion*

In *Investors Equity I, supra*, 195 Cal.App.4th 1519, we summarized the underlying dispute and the circumstances leading to the court's decision to stay the action. We incorporate by reference the factual summary from that opinion but will repeat some of the pertinent facts here.

"The first amended complaint alleges [IELHC] is the sole shareholder of Investors Equity Life Insurance Company of Hawaii, Ltd. (IEL), an insurance company [that was] the subject of a liquidation action in the Hawaii Circuit Court for the First Circuit." (*Investors Equity I, supra*, 195 Cal.App.4th at p. 1523.)

"IEL was a life insurance company organized under and regulated by the State of Hawaii with approximately 99 percent of its policyholders residing in that state. [IELHC] alleges it is a Delaware Corporation 'authorized to transact business as a foreign corporation in . . . California.' It acquired all of IEL's shares in 1991." (*Investors Equity I, supra*, 195 Cal.App.4th at p. 1524.)

In 1994, the Hawaii Circuit Court for the First Circuit declared IEL insolvent and Hawaii's insurance commissioner obtained an order liquidating IEL. (*Investors Equity I, supra*, 195 Cal.App.4th at pp. 1524-1525.) The Hawaiian Supreme Court affirmed this ruling. (*Metcalf v. Investors Equity Life Ins. Co. of Hawai'i, Ltd.* (1996) 910 P.2d 110.) The Hawaii insurance commissioner filed a lawsuit against IELHC for tortious misconduct in causing the failure of IEL. The case settled and IELHC surrendered its shares in IEL to the commissioner. (*Investors Equity I, supra*, 195 Cal.App.4th at p. 1525.)

In 2009, IELHC filed this action in California against several defendants, including the current Hawaii Insurance Commissioner, several of his predecessors, the commissioner's employees, the law firm and individual lawyers representing the commissioner, and the Hawaii Life and Disability Insurance Guaranty Association

(collectively referred to in this opinion as Defendants). IELHC sought “damages and equitable relief for [D]efendants’ purported ‘wrongful taking or deprivation of [its] right, title, and interest in the monies and assets remaining in the estate of and in the stock . . . of’ IEL[.]” worth more than \$21 million. (*Investors Equity I, supra*, 195 Cal.App.4th at p. 1524.) The first amended complaint alleged 14 causes of action, including constitutional violations for “unlawful taking, denial of due process and equal protection, various species of fraud, breach of fiduciary duty, conversion, and unfair competition in violation of Business and Professions Code section 17200.” (*Id.* at p. 1526.)

## II. 2009 Order Staying the Action

Defendants filed motions to stay or dismiss the action for forum non conveniens. In its lengthy minute order, the court ruled, “The [c]ourt finds that the strong presumption accorded to [IELHC’s] choice of forum is outweighed by compelling evidence that California is a seriously inconvenient forum, taking into consideration the suitability of Hawaii as a forum, and the private and public interests represented by this case.” It discussed and balanced the forum non conveniens factors as follows:

“Without determining whether California would have subject matter jurisdiction on the claims set forth in the First Amended Complaint, and solely for the purpose of balancing the factors required, the [c]ourt evaluates the factors as follows. As to the private party factors, the [c]ourt notes that the documentation and recordation of the acts claimed of repose in the State of Hawaii, as to most, if not all of the parties who would have been involved in the activity. To the extent that the First Amended Complaint emphasizes the failure to currently submit accurate financial records and current malfeasance, this would be even more the case. Further[,] it appears that as between the two states, California would have the most difficulty in securing personal jurisdiction over percipient witnesses, compared to Hawaii. The [c]ourt accords this some weight, but in light of the early stage of the proceedings, does not accord it great

weight. Insofar as a final trial witness list and the availability of evidence is not generally clear at this early stage.

“Great weight, however, is given [to] the public factors in this particular case. The complaint and evidence do not suggest any substantial conduct having occurred in California, and other than establishing that [IELHC], a corporation, may have suffered monetary losses due to the Hawaii-based conduct, and the nexus to California is weak. In contrast, the following factors are given weight by the [c]ourt and when considered together, far outweigh the public interest of the State of California in having this matter tried in California: (1) The State of Hawaii judicial branch has continuing supervisory jurisdiction over this *ongoing* insurance company liquidation matter[;] (2) the existence of a Hawaii court order purports to extend protections to some of the named defendants relative to their ability to manage and conserve the assets of the distressed IEL[;] (3) The potential that given various defenses, the scope of injunctive relief set forth in Hawaii court judgments/orders will need to be interpreted and the real possibility of conflicting interpretations by a foreign state of Hawaii’s own orders[;] (4) The superior interest in residents of Hawaii in the oversight and conduct of public-and quasi-public officials involved in the important functions of supervising the winding down of distressed insurance companies who have, as in this case, served almost exclusively the insurance needs of Hawaiian residents. . .[;] (5) Key named defendants are, or have been, in the Office of the Insurance Commissioner, which is a Division of the State of Hawaii Department of Commerce and Consumer Affairs, a function deemed vitally important to the economic interest of the Hawaiian people [and t]here is a current Hawaiian interest in consumer protection of Hawaii insureds[;] (6) The corollary interest by the same population as to the proper operation of the non-profit defendant Hawaii Life and Disability Insurance Guaranty Association. Described as the ‘F.D.I.C.’ for insureds, this defendant is supported through fees paid by Hawaii insurance companies, like IEL. As such, the citizens of Hawaii are the beneficiaries of the protections afforded by Hawaii

Life and Disability Insurance Guaranty Association, they help fund it through their insurance premiums and, they are its victims, if it fails to perform its duties. [¶] As in the case of *Ford Motor Co. v. Ins. Co. of North America* (1995) 35 [Cal.App.4th] 1168, the [c]ourt has considered what the lawsuit actually intends to cure in evaluating which state has a more substantial interest in regulating or fixing the conduct at issue. In this respect, the factors heavily favor Hawaii.” (Underline omitted.) This court affirmed the ruling in *Investors Equity I, supra*, 195 Cal.App.4th at page 1524.

### III. 2012 Order Dismissing the Action

We need not discuss the events leading up to this order other than to say that in early 2015 this court (a different panel) reversed the dismissal in *Investors Equity II, supra*, 233 Cal.App.4th 1363. Acknowledging some of the statements written in the *Investors Equity I* opinion were confusing regarding IELHC’s California residency status, this court nevertheless concluded the trial court abused its discretion in finding these statements constituted law of the case. (*Id.* at p. 1368.) We directed the trial court to reinstitute its prior stay. (*Id.* at p. 1383.)

### IV. 2015 Order Denying Motion to Vacate 2009 Stay Order

In 2015, IELHC moved to vacate the 2009 stay order, arguing it was a California resident entitled to its choice of forum. It asserted the trial court was required to follow this court’s “directive” written in the *Investors Equity II* opinion to consider evidence on the issue of residency. IELHC submitted ample evidence establishing it was a California resident.

Defendants argued IELHC’s contentions were identical to those raised in 2009 and the motion to vacate should be treated as an untimely motion to reconsider the 2009 stay order. They asserted the court lacked jurisdiction to reconsider the prior order under section 1008. In addition, they maintained the stay order should remain because IELHC failed to establish Hawaii proved to be an unsuitable forum because they never

commenced an action there (despite having six years to do so). The court denied the motion to vacate the stay and did not provide any explanation for its ruling.

IELHC appealed the order and also sought review by a writ of mandate. This court dismissed the appeal as being from a non-appealable order. (*Investors Equity IV, supra*, G052983.) This court also denied the writ petition. (*Investors Equity III, supra*, G052978.) In our order we stated, “Respondent court may consider a motion to dismiss this action if petitioner fails to commence an action in Hawaii within six months of the date of this order.” (*Ibid.*) IELHC did not commence an action in Hawaii within the six-month period.

#### V. 2016 Order Dismissing Action and Denying Motion for Reconsideration

In September 2016, Defendants moved to dismiss for failure to prosecute under section 583.410. In November 2016, IELHC filed a motion to reconsider the ruling on its motion to vacate the stay. It argued Defendants’ motion to dismiss was a “new fact or circumstance” warranting reconsideration. (§ 1008, subd. (a).)

A different trial judge than the one who initially stayed the action in 2009 heard these motions. The court denied the motion for reconsideration, explaining the “new fact” must be relevant to the stay order and Defendants’ motion did not qualify because it was simply evidence a party was seeking relief in the case.

Although the court ruled the motion for reconsideration failed on procedural grounds, it addressed the merits of the arguments raised. First, it rejected IELHC’s argument its status as a California resident was “determinative.” The court noted the prior trial judge assumed IELHC was a California resident in her original analysis of the issue in 2009. “And if the same assumption is made now, the result would be the same — that Hawaii is a much more suitable forum. [IELHC] claims that Hawaii would refuse to exercise jurisdiction or would deem [the] claims time-barred, but it has failed to commence an action there to determine if that is so, and per a 2015 Hawaii Supreme Court decision, the majority of the claims asserted here were not considered in

the liquidation proceedings. Therefore, as [IELHC] has failed to commence a claim in Hawaii for more than [seven] years now, dismissal for failure to prosecute is warranted under” section 583.410, subdivision (a), “and potentially also under” section 583.420, subdivision (a).

The court noted the trial judge who stayed the action in 2009 clearly stated in her ruling there was a ““strong presumption accorded”” to IELHC’s choice of forum. The court cited case authority using the terminology ““strong presumption”” in forum non conveniens cases, and inferred the trial judge’s use of the term “suggests that she had assumed [IELHC] was a [California] resident in reaching her decision.” Next the trial court cited cases holding the “strong presumption” was not conclusive, and a trial court may “disturb[]” a plaintiff’s choice of forum in certain circumstances. It noted the amount of deference given is different for a business entity versus an individual plaintiff, and the 2009 ruling was based on the determination Hawaii was a suitable forum and the relevant public and private interests weighted heavily in favor of having the action litigated there. The court concluded, IELHC “failed to demonstrate that any changed circumstances would compel a contrary conclusion” if it was a California resident.

The court discussed the factors making Hawaii a suitable forum. After summarizing case authority on this issue, the court concluded IELHC failed to prove Hawaii was not a suitable alternative forum because it never filed an action there. It rejected IELHC’s argument the liquidation proceedings in Hawaii would make its claims time barred. It explained the Hawaiian court had not yet ruled on the claims asserted in this action, and the California action raised other causes of action against other parties, including “the Liquidator himself.” Finally, because IELHC had not pursued the case in Hawaii, there was no evidence suggesting Hawaii would not still be a suitable forum.

As for the dismissal motion, the court stated IELHC had failed to commence a claim in Hawaii for more than seven years and dismissal for failure to prosecute was warranted. It cited case authority holding that when a case is stayed in

California, following the granting of a forum non conveniens motion, the trial court has discretion to dismiss if the plaintiff fails to act with reasonable diligence in pursuing the claim in the alternative forum. (Citing *Van Keulen v. Cathay Pacific Airways, Ltd.* (2008) 162 Cal.App.4th 122 (*Van Keulen*).) On December 2, 2016, the court entered a judgment in favor of Defendants.

## DISCUSSION

IELHC's appeal can be loosely organized into two general categories: first, the majority of arguments seek to revisit the 2009 forum non conveniens ruling; and second, IELHC challenges the trial court's decision to dismiss the case for failure to prosecute. We will address these two categories separately below.

### I. No "Directive" From This Court to Reconsider the 2009 Stay?

IELHC asserts this court in *Investors Equity II* "in effect ordered the trial court to receive evidence" on the issue of residency "and by obvious implication, to decide that issue." We did no such thing.

In the *Investors Equity II* appeal, our task was limited to reviewing the trial court's decision to dismiss the action. We concluded the court abused its discretion because it misapplied the law of the case doctrine to our earlier opinion. (*Investors Equity II, supra*, 233 Cal.App.4th at pp. 1377-1378.) "Defendants' 'renewed' motion to dismiss this case was based on three asserted findings made by this court in our earlier opinion: (1) the fact they had 'stipulated to personal jurisdiction in Hawaii should Plaintiff re-file the lawsuit there'; (2) the determination that 'the statutes of limitation for Plaintiff's causes of action were the same in both California and Hawaii'; and (3) the determination 'Plaintiff is *not* a California resident.' Defendants asserted that all of these findings 'are now law of the case going forward,' and argued the first two were sufficient to establish Hawaii's suitability as an alternative forum, while the third demonstrated that California should have no significant interest in continuing to retain jurisdiction.

However, in the context of this case, none of those asserted findings was entitled to the significance defendants attributed to them, and none qualified as law of the case.” (*Ibid.*)

After explaining why each “finding” did not qualify as law of the case, we discussed one more error. “Further, having erroneously concluded [IELHC’s] nonresident status qualified as law of the case, *the trial court then compounded its error by also refusing to consider whether the additional evidence* offered by [IELHC] to demonstrate its significant ties to California might bear on the analysis of whether this state still has an interest in retaining jurisdiction over this case. The court simply declared that because law of the case applied, the additional evidence offered by plaintiff was automatically rendered irrelevant.” (*Investors Equity II, supra*, 233 Cal.App.4th at p. 1381, *italics added.*) We clarified that because law of the case does not apply to factual findings, a party should not be precluded “from offering additional *evidence* when an issue is reconsidered in the trial court following remand from the appellate court—even where the appellate court has reversed a trial court’s earlier decision based on the insufficiency of the evidence.” (*Ibid.*)

In the opinion we concluded this additional error provided further support for our determination the court abused its discretion. “[B]efore deciding whether the changed circumstances relied upon by defendants in their renewed motions warranted an outright dismissal of this case, the trial court was obligated to consider whatever relevant evidence plaintiff offered in opposition to that request—including evidence that plaintiff maintains a significant relationship with this state, such that California would continue to have an interest in ensuring it has a proper forum in which to litigate its claims.” (*Investors Equity II, supra*, 233 Cal.App.4th at p. 1381.)

Thus, the purported “directive” in *Investors Equity II* was actually only an admonishment to the trial court that it *should have* considered additional evidence on the issue of residency. The ruling was made in the context of what *should have happened* when the trial court considered Defendants’ motion to dismiss based on forum non

conveniens. After the appeal was final, Defendants' next motion to dismiss was based on IELHC's failure to prosecute its action. Residency was not relevant to that determination.

We recognize that after the *Investors Equity II* opinion became final, IELHC filed a motion to vacate the 2009 stay order and later filed a motion for reconsideration. These rulings were not appealable and this court denied IELHC's writ petition. (*Investors Equity III, supra*, G052978; *Investors Equity IV, supra*, G052983.)

It would have been appropriate for this court to review these rulings in this appeal from the final judgment. Unfortunately, IELHC's briefing on appeal focuses on the merits of the motion and fails to address the alleged procedural defects. This omission is fatal to the claim. We must affirm under the appellate doctrine that a trial court ruling is presumed correct in the absence of a record showing the contrary. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564 (*Denham*).)

As IELHC noted in its briefing, the trial court did not offer a reason for denying the motion to vacate the stay. It provides numerous pages of legal analysis and case authority to support its theory the trial court erred by failing to consider residency-related evidence, which all concern *the merits* of the stay. This argument ignores that Defendants asserted the motion failed for both procedural and substantive reasons. IELHC does not address the merits of the procedural argument, i.e., the motion to vacate was really an untimely motion for reconsideration of the 2009 ruling. IELHC does not suggest what legal authority authorizes a trial court to reconsider a forum non conveniens order entered six years prior? (§ 1008, subd. (a) [must file reconsideration motion 10 days after service of the order at issue].) Moreover, as stated in both prior published opinions, we anticipated the stay would be lifted only if there was new evidence or circumstances showing IELHC was unable to pursue the action in Hawaii making it an unavailable alternative forum. (See *Diaz-Barba v. Superior Court* (2015) 236 Cal.App.4th 1470, 1473-1474 (*Diaz-Barba*) [court did not abuse discretion in lifting

stay after Mexican courts dismissed two suits making it unavailable alternative forum].) IELHC never even attempted to file the action in Hawaii, and consequently, there was no new evidence the forum was unavailable.

Because it is just as likely the trial court denied the motion as being procedurally defective, IELHC's decision to address only the substantive issues on appeal was an unfortunate omission. "A judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.' [Citations.]" (*Denham, supra*, 2 Cal.3d at p. 564.) We therefore presume the court's decision was correct, and affirm the trial court's denial of the motion to vacate the stay.<sup>2</sup>

With respect to IELHC's 2016 motion to reconsider the motion to vacate, the trial court rejected IELHC's contention it had evidence of new circumstances. It explained there was no merit to IELHC's contention that evidence Defendants filed a motion to dismiss for lack of prosecution was grounds to support reconsideration under section 1008. In its ruling, the trial court explained Defendants' conduct must be a "new fact" *relevant* to the stay order. On appeal, IELHC does not dispute this ruling. We need not say more. The absence of legal analysis waives the issue. (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785 ["When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived"].)

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<sup>2</sup> Having presumed the trial court's ruling was correct on procedural grounds, there is no need to analyze whether the decision was also correct on substantive grounds. Accordingly, we need not address IELHC's numerous arguments challenging the merits of the motion to vacate the 2009 stay and other issues related to forum non conveniens.

## II. *No Jurisdiction to Reconsider 2009 Ruling.*

IELHC raises five arguments on appeal that relate to the forum non convenience determination the trial court made in 2009. They are as follows: (1) IELHC is a California resident entitled to select California as its choice of forum; (2) Hawaii was not a suitable forum; (3) the action should proceed in California to preserve IELHC's right to a jury trial; (4) the unconditional stay was improper; and (5) public policy supports California residents selecting a forum in California. We previously reviewed and affirmed the trial court's decision to stay the action on the equitable grounds of forum non conveniens. (*Investors Equity I, supra*, 195 Cal.App.4th at p. 1524.) IELHC does not suggest why it is appropriate to revisit issues related to an order affirmed by this court many years ago. As determined above, our prior decisions did not direct the court to reconsider the stay order, and IELHC's repeated attempts to vacate the stay were unsuccessful due to procedural defects. We need not consider renewed challenges to the same forum non convenience arguments decided many years ago. (*Investors Equity I, supra*, 195 Cal.App.4th at p. 1524.)

## III. *Motion to Dismiss For Failure to Prosecute*

The parties appear to agree that the abuse of discretion standard applies to our review of the trial court's decision to dismiss the case for lack of prosecution. We agree that standard is appropriate for appellate review of a trial court's decision to dismiss a previously stayed action based upon a party's failure to prosecute its claims diligently in a foreign forum. (See *Auffret v. Capitales Tours, S.A.* (2015) 239 Cal.App.4th 935, 940-942 (*Auffret*); *Van Keulen v. Cathay Pacific Airways, Ltd.* (2008) 162 Cal.App.4th 122, 131.) "Such abuse of discretion is generally considered to be demonstrated when the trial court has exceed the bounds of reason. [Citation.] We must presume the trial court's order was correct, and it is the plaintiff's burden to overcome that presumption and establish a clear abuse of discretion. [Citations.]" (*Landry v. Berryessa Union School Dist.* (1995) 39 Cal.App.4th 691, 698.)

More recently the appellate court in *Diaz-Barba, supra*, 236 Cal.App.4th 1470, applied the substantial evidence standard when reviewing the trial court's implicit findings plaintiffs made a good faith attempt to pursue litigation in Mexico. (*Id.* at pp. 1484-1490.) With respect to the case before us, applying either standard of review, we affirm the trial court's dismissal.

Section 583.410, subdivision (a), provides that "[t]he court may in its discretion dismiss an action for delay in prosecution pursuant to this article on its own motion or on motion of the defendant if to do so appears to the court appropriate under the circumstances of the case."

"In other words, while California's policy *favors* trial on the merits, there comes a time when that policy is overridden by California's policy requiring dismissal for failure to prosecute with reasonable diligence. As this is true for *any* action prosecuted in California courts, it must be true for an action initially filed in California court but stayed on forum non conveniens grounds. In short, California's interest in assuring an adequate forum for a California plaintiff is not absolute, and can be overcome when the plaintiff is unreasonably dilatory in prosecuting the action in the convenient forum. If, by a California plaintiff's lack of reasonable diligence in prosecuting its action, California has lost its interest in providing an adequate forum, an action originally stayed on forum non conveniens grounds may therefore be dismissed." (*Van Keulen, supra*, 162 Cal.App.4th at p. 130.)

In *Van Keulen*, several airline pilots brought wrongful termination actions against their employer (Employer) in both California and Hong Kong. (*Van Keulen, supra*, 162 Cal.App.4th at pp. 125-126.) Employer moved to dismiss or stay the California action on the ground of forum non conveniens. (*Id.* at p. 126.) The California trial court dismissed the action with respect to the non-California plaintiffs and stayed the action with respect to the plaintiffs who were California residents. (*Id.* at p. 126.) After the appellate court affirmed the stay order on appeal, Employer moved to dismiss the

California action on the grounds that the pilots had not been diligent in pursuing their action in Hong Kong. (*Id.* at pp. 127-129.) The trial court dismissed the action and the pilots appealed.

The appellate court in *Van Keulen* determined the trial court had the discretionary authority to dismiss the California action due to the pilots' failure to diligently prosecute their action in Hong Kong, finding that the factors set forth in California Rules of Court, rule 3.1342(e) weighed in favor of dismissal.<sup>3</sup> (*Van Keulen, supra*, 162 Cal.App.4th at p. 131.) The appellate court noted the action was stayed at the end of 2001 and the pilots did not bring their suit or join the pending suit against Employer in Hong Kong until over four years later (February 2006). (*Id.* at p. 131.) It stated, "On the record before us, [the pilot's] supposed diligence consists of 'contact[ing]' [attorneys in Hong Kong who filed the pending suit against Employer in Hong Kong] . . . immediately after the stay was issued in December 2001, 'ask[ing]' to be joined in [the Hong Kong lawsuit] and then doing *absolutely nothing for three years*, until December 2004 when they discovered [the plaintiffs in the Hong Kong Lawsuit] had settled the action without them." (*Id.* at p. 132.) The court determined the three year delay was "wholly attributable" to the pilots. (*Id.* at p. 133.)

Here, it is undisputed the trial court stayed the case in 2009 and dismissed it seven years later in 2016. It is also undisputed that during this same period IELHC never filed an action in Hawaii or took any other steps to litigate its claim in Hawaii. All of the factors set forth in California Rules of Court, rule 3.1342 weigh in favor of dismissal.

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<sup>3</sup> Those factors include availability of the other party for service, diligence in seeking to effect service, the extent of settlement negotiations, diligence in pursuing discovery, the nature and complexity of the case, whether another action was pending, the extensions of time or delay attributable to the other party, the condition of the court's calendar in the other forum, whether the interests of justice are served by dismissal or trial, and any other relevant fact or circumstance. (*Van Keulen, supra*, 162 Cal.App.4th at p. 131.)

The seven-year delay in litigating its claims in Hawaii can wholly be attributed to IELHC. Based on the record before us, it cannot be said the court abused its discretion in dismissing the action for IELHC's failure to prosecute its action in Hawaii. (*Van Keulen, supra*, 162 Cal.App.4th at p. 131.)

IELHC argues the *Van Keulen* decision is "an aberrational decision by one lone court." Usually such a bold claim is supported by citations to other appellate decisions criticizing or reaching a different result from the one in *Van Keulen*. IELHC fails to do so, and to make matters worse, omits from its discussion the case authority recognizing *Van Keulen* as sound legal precedent. In *Auffret, supra*, 239 Cal.App.4th 935, the appellate court acknowledged an action stayed due to forum non conveniens may be dismissed for failure to prosecute diligently in the foreign forum. However, in that case it determined the trial court's dismissal was premature. (*Id.* at pp. 941-942.) A different appellate division in *Diaz-Barba, supra*, 236 Cal.App.4th at page 1484, also recognized the *Van Keulen* case's holding that California can lose its interest in providing an adequate forum due to lack of prosecution when the action was originally stayed due to forum non conveniens. In that case, the appellate court determined defendants were "not forthcoming with the critical facts" because there was evidence defendants' conduct attributed to the delay as well as evidence plaintiffs sought judicial recourse in the alternative suitable forum (Mexico). (*Id.* at pp. 1485, 1487.) It affirmed the trial court's decision to lift the stay because "Mexico turned out not to be a suitable alternative forum." (*Id.* at p. 1489.)

We find the legal reasoning of the *Van Keulen* opinion to be persuasive and applicable to this case. IELHC points out there are some factual distinctions, but we conclude none are dispositive to the final legal analysis supporting the holding in *Van*

*Keulen*.<sup>4</sup> Indeed, no valid purpose would be served by rejecting the existing case precedent in favor of requiring California courts to hold cases open indefinitely following a forum non conveniens ruling. Moreover, in the federal courts there is ““a long line of jurisprudence holds that a plaintiff whose case is dismissed for forum non conveniens must litigate in the foreign forum in good faith.’ (*Dardengo v. Honeywell Int’l, Inc. (In re Air Crash Over the Midatlantic)* (N.D.Cal. 2011) 792 F.Supp.2d 1090, 1095, italics omitted.) ““A party should not be allowed to assert the unavailability of an alternative forum when the unavailability is a product of its own purposeful conduct.”” [Citation.] ‘A conditional forum non conveniens dismissal protects a plaintiff against the possibility that the foreign forum will not hear his case. It does not give the plaintiff license to deliberately prevent his suit in the foreign court from going forward in order to render an alternative forum defective.’ [Citation.]” (*Diaz-Barba, supra*, 236 Cal.App.4th at p. 1485.) Here, IELHC claims the discretionary dismissal statute should not apply because it has “fought relentlessly” to keep the case in California, filing many motions, appeals and writs. In the context of a forum non conveniens case, this argument actually hurts IELHC’s cause, because essentially it is an admission IELHC did not attempt to litigate in the foreign forum in good faith.

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<sup>4</sup> IELHC also suggests the *Van Keulen* opinion should not be followed because it did not address the legal presumption given to California residence in selecting a forum. It has misread the opinion. The court in *Van Keulen* began its legal analysis discussion by recognizing the presumption and then weighed the policy reasons for dismissing rather than staying actions brought by a California resident. (*Van Keulen, supra*, 162 Cal.App.4th at pp. 129-130.)

DISPOSITION

The judgment is affirmed. Respondents shall recover their costs on appeal.

O'LEARY, P. J.

WE CONCUR:

MOORE, J.

GOETHALS, J.